instead of the requisite two copies were served upon the detainee.

It follows, therefore, that there has been a serious breach of the mandatory requirements of r 3(2) the effect of which is to render the detainee's continued detention unlawful. It matters not one whit that the detainee did in fact make representations to the Advisory Board which considered the same and made recommendations thereon which led to the detainee's continued detention. In other words, once a breach of a mandatory statutory requirement is established, the fact that the detainee was not prejudiced is irrelevant. It is only where a breach of a directory provision is involved that it would be material to consider whether a detainee has suffered any ensuing prejudice. (See *Pratap*'s case[10] cited above.)

In any event, as I have already noted, failure to provide the detainee with his own copy of Form 1 for his retention and use at the proceedings before the Advisory Board might well have been a disadvantage to him and thus the risk of prejudice cannot be ruled out. The court will not go into the likelihood of prejudice. The risk of it is enough.

This application for habeas corpus is therefore granted and the detainee must be set at liberty forthwith.

By way of postscript, I would observe that although the detainee may well think that the result of this application is a pyrrhic victory since the period of his detention would, in any case, have expired in three days' time, he must remember that it was his inaction and delay which had contributed substantially to this, as I have indicated at the outset. Nevertheless, this judgment may perhaps be useful as providing yet another precedent on the subject of preventive detention cases in this country.

Application allowed.

Solicitors: *Karpal Singh & Co.*

Reported by *Zarinah Marican*

Sobri bin Arshad v Associated Tractors Sdn Bhd

HIGH COURT (PENANG) — BANKRUPTCY NO 29-844-89
EDGAR JOSEPH JR J
14 JANUARY 1991

Bankruptcy — Creditor's petition — Affidavit verifying petition filed on day before the creditor's petition — Validity of petition — Bankruptcy Act 1967, s 6 — Bankruptcy Rules 1969, r 106

In these bankruptcy proceedings, the creditor's petition was dated 10 November 1989 but the affidavit verifying the creditor's petition was affirmed to on 9 November 1989, ie one day before the date of the creditor's petition. The judgment debtor sought to impugn the bankruptcy petition on this ground.

Held, dismissing the judgment creditor's petition:

(1) The flaw in the proceedings vitiates the creditor's petition and cannot be cured by the discretionary powers of the court conferred by s 131 of the Bankruptcy Act 1967.

(2) It is also not open to the court to extend the time for filing as there is no valid petition before the court.

(3) More than 11 months have lapsed since the alleged bankruptcy, and any affidavit verifying the petition to be resworn and re-filed must be re-filed within six months from the alleged act of bankruptcy. As this has not been done, the judgment debtor has acquired a vested right which cannot be taken away.

[Bahasa Malaysia summary

Di dalam prosiding kebankrapan ini, petisyen pemiutang bertarikh 10 November 1989 tetapi afidavit yang mengesahkan petisyen itu diakusah pada 9 November 1989, iaitu satu hari sebelum tarikh petisyen pemiutang itu. Penghutang penghakiman cuba mengenepikan petisyen kebankrapan atas alasan ini.

Diputuskan, menolak petisyen pemiutang penghakiman itu:

(1) Kesalahan di dalam prosiding menjadikan petisyen pemiutang tidak sah dan ia tidak boleh diperbaiki dengan kuasa budibicara mahkamah yang diberikan oleh Akta Kebankrapan 1967.

(2) Tidak ada jalan bagi mahkamah melanjutkan masa untuk pemfailan kerana tidak ada petisyen yang sah di depan mahkamah.

(3) Lebih daripada 11 bulan telah berlalu semenjak kebankrapan yang didakwa itu, dan apa-apa afidavit mengesahkan petisyen itu yang harus diakusah semula dan difailkan semula mesti difailkan dalam tempoh enam bulan dari kejadian kebankrapan yang didakwa itu. Oleh kerana ini tidak dilakukan, penghutang penghakiman telah memperolehi satu hak dalam tangan (vested right) yang tidak boleh diambil daripadanya.]

Cases referred to

1 *Anon* (1861) 5 LT 517 (folld)
2 *The Western Benefit Building Society* (1864) 33 Beav 368; 55 ER 409 (folld)
3 *Chin Yoon Timber Co* v *Overseas Lumber Bhd* [1978] 2 MLJ 173 (folld)
4 *Sari Atlantic Sdn Bhd* v *Aik Kim Enterprise* [1988] 1 MLJ 201 (not folld)

5 *Re Sutherland Manure Co* (1893) 11 NZLR 460 (refd)
6 *In re North, ex p Hasluck* [1895] 2 QB 264 (follD)

Legislation referred to
Bankruptcy Act 1967 s 6
Bankruptcy Rules 1969 r 106

M Thayalan Muniandy for the judgment debtor.
Kulwant Kaur for the judgment creditor.

Cur Adv Vult

Edgar Joseph Jr J: In these bankruptcy proceedings, the creditor's petition was dated 10 November 1989 but the affidavit verifying the creditor's petition was affirmed to on 9 November 1989 ('the affidavit') that is to say, one day before the date of the creditor's petition. The Bankruptcy Act 1967, by s 6 and the Bankruptcy Rules 1969, by r 106 require that the creditor's petition must be verified by an affidavit as to the truth of the contents thereof. Counsel for the judgment debtor has therefore sought to impugn the bankruptcy petition on this ground.

It would appear that the validity of the creditor's petition depends on there being filed in court an affidavit verifying the truth of the allegations therein. So, for example, the case of *Anon*[1] is authority for the proposition that every petition for adjudication of bankruptcy must be accompanied with an affidavit verifying the allegations therein or it would not be received.

Furthermore, step no 7 of the Procedural Tables No 6 at pp 119-120 of 7 *Court Forms* (2nd Ed) (1988 issue) on Bankruptcy and Insolvency, reinforce that view.

There are also general considerations which supported the contention of counsel for the judgment debtor.

It is trite law that an affidavit must be made in some cause or matter pending in court. An affidavit cannot support an 'unborn petition' as a petition comes to life only when presented.

In *The Western Benefit Building Society*,[2] Sir John Romily MR decided that an affidavit sworn before the presentation of the petition 'amounts to nothing'. That case was followed in the local case of *Chin Yoon Timber Co* v *Overseas Lumber Bhd*[3] where Syed Othman J (as he then was) struck out a winding-up petition because the affidavit was sworn before the presentation of the petition.

I therefore agree with the submissions of counsel for the judgment debtor that the flaw in the proceedings hereinbefore mentioned vitiates the creditor's petition and cannot be cured by the discretionary powers of the court conferred by s 131 of the Bankruptcy Act. Nor, for that matter, is it open to me to extend the time for filing as there is no valid petition before the court. As was well put in the case of *Chin Yoon Timber Co*[3] at p 174: '...The question of extension or abridgment to which this rule relates, does not arise. The affidavit cannot therefore be said to relate to any proceedings. Extending what the Master of the Rolls said in the *Re Western Benefit Building Society* you cannot verify to an unborn petition; a petition comes to life only when presented...'.

Lest I be accused of an oversight, I should perhaps refer to the case of *Sari Atlantic Sdn Bhd* v *Aik Kim Enterprise*,[4] a company winding-up case, which was cited for the proposition that a defect in an affidavit such as in the present case is curable by the court by allowing an extension of time to refile the affidavit.

It would appear that the judgment in *Chin Yoon Timber Co*[3] was not cited to or by the court in the *Sari Atlantic* case.[4] With respect, therefore, the judgment in the latter case would appear to have been given per incuriam.

Moreover, even if I should follow the *Sari Atlantic* case,[4] the application by counsel for the judgment creditor made orally in open court to refile the affidavit was not supported by any explanation as to how the flaw in the proceedings arose. No special circumstances and/or good cause has been shown for extension of time as required under r 275 of the Bankruptcy Rules.

Under the circumstances, even if it were open to me to grant an extension of time, I am not prepared to do so in view of the fact that there is no material before me to exercise my discretion to enable the judgment creditor to re-file an affidavit.

In any event, more than 11 months have lapsed since the alleged act of bankruptcy. Any affidavit verifying the petition to be re-sworn and re-filed must be re-filed within six months from the alleged act of bankruptcy and as this has not been done, the judgment debtor has acquired a vested right which cannot be taken away.

In a last ditch stand to salvage her case, counsel for the judgment creditor, cited to me the judgment of Williams J in the New Zealand Supreme Court case of *Re Sutherland Manure Co*[5] where his Lordship dismissed a petition for winding-up on the ground that the facts afforded no justification at all for the making of a winding-up order on the petition of a contributory. The court went further and held that even if the petition were equivalent to a creditor's petition there was nothing on the face of it that would justify the granting of a winding-up order. It had to appear on the face of the creditor's petition that the creditor's rights would be in some way be prejudiced by the voluntary winding-up but no such case had been made out on the petition.

It is true, however, that a preliminary objection had been taken that the affidavit verifying the petition was not sworn after but before the petition was filed. The learned judge recognized the weight of the objection because if an affidavit is sworn in such circumstances the person making it would not be guilty of perjury if the affidavit were false. An affidavit verifying the petition was, however, filed 12 days after but did not attempt to explain why the requisite affidavit verifying the petition was not filed within the proper time. In these circumstances, the learned judge made the chance and somewhat inconclusive remark — doubtless by way of obiter dictum — 'If however, that were the only other objection to the petition, probably the court might in some way or other get over the difficulty which the petitioner has created for himself by neglecting the rule.' As against this are the other authorities cited above, which take a contrary view and which I prefer to follow.

On a concluding note, bearing in mind that bankruptcy proceedings, if successful, would have harsh and penal consequences, meticulous compliance with the law is often necessary. The case of *In re North, ex p Hasluck*[6] is authority for the proposition that the statute relating to bankruptcy should be construed in a manner most favourable to the person affected.

Creditor's petition dismissed.

Solicitors: *Meena, Thayalan & Partners; Lim Kim Chuan & Co.*

Reported by *Zarinah Marican*

Bhanu Sekaramani v Nagamma

HIGH COURT (KUALA LUMPUR) — DIVORCE PETITION NO S7-47-290 OF 1988
LIM BENG CHOON J
10 JANUARY 1991

Family Law — Divorce — Living apart for continuous period of two years — Two-year separation prima facie proof of breakdown of marriage — Law Reform (Marriage and Divorce) Act 1976, ss 53(1), 54(1) & (2)

This is a divorce petition instituted by the husband to dissolve the marriage solely on the ground that the husband and the wife have been living apart continuously for more than two years since October 1984 until the presentation of this petition. The respondent denied that the parties had been living apart for a continuous period of two years since October 1984. She believed that the husband had been committing adultery with an unknown woman.

Held, dismissing the petition:

(1) It is clear from s 53(1) of the Law Reform (Marriage and Divorce) Act 1976 ('the Act') that the court should have regard to the fact that the parties to a divorce petition have been separated for at least two years prior to the filing of the divorce petition. But the two-year separation is only prima facie proof of the breakdown of the marriage. It is rebuttable when the respondent can show that the two-year separation per se does not cause or lead to the breakdown of the marriage. This is so because of the wording of s 54(2) of the Act.

(2) Under paras (a) and (b) of s 54(1) of the Act, the commission of adultery by the respondent or gross misbehaviour on the part of the respondent is not per se sufficient ground for a divorce simply because the respondent may be able to show that the petitioner has condoned the adultery or misbehaviour and the court must consider the conduct and circumstances of the case to see whether it is justifiable to grant a decree.

(3) Desertion per se under s 54(1)(c) is only prima facie proof of the fact that the marriage had broken down irretrievably; it is not conclusive but rebuttable.

(4) The two grounds relied on by the petitioner to support his allegation that the marriage had broken down irretrievably — that the wife refused to stay with him or stay in his parents' house and the wife scolded him and showed disrespect to him — would not be sufficient to justify that the marriage has irretrievably broken down, even if they were true.

[Bahasa Malaysia summary

Ini adalah satu petisyen perceraian yang dimulakan oleh suami untuk membubarkan perkahwinan atas alasan tunggal bahawa suami dan isteri telah tinggal berjauhan secara berterusan untuk lebih daripada dua tahun semenjak Oktober 1984 hingga penyampaian petisyen ini. Responden menafikan yang kedua-dua pihak telah tinggal berjauhan secara berterusan untuk dua tahun sejak Oktober 1984. Beliau percaya bahawa suaminya telah berzina dengan seorang wanita yang tidak dikenali.

Diputuskan, menolak petisyen itu:

(1) Adalah jelas dari s 53(1) Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 ('Akta itu') bahawa mahkamah harus mengambil notis tentang fakta yang pihak-pihak kepada satu petisyen perceraian telah berpisah